13 APRIL 04

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Whitbeck, C.J. and White, and Donofrio, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

LATASHA GENISE MORSON,

Defendant-Appellant.
_____/

Supreme Court
No. 124083

Court of Appeals
No. 238750

Circuit Court
No. 99-167284-FC

APPELLANT'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

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TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION/RELIEF SOUGHT

Defendant filed a motion to allow supplemental briefing on the following issue:

> 1) Whether the due process clauses of the state and federal constitutions require that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person. See: *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); and *Washington v Blakely*, 111 Wash App 851; 47 P 3d 149 (2002), *cert gtd sub nom Blakely v Washington*, 2003 US LEXIS 7709 (U.S. 10/10/02 Docket No. 02-1632)

The scoring of the defendant's sentencing guidelines in this case did not violate procedural due process. The Court of Appeals' ruling remanding for resentencing should be reversed for reasons stated *Infra* and in Plaintiff-Appellant's Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

I. IS THE UNITED STATES SUPREME COURT DECISION OF *BLAKELY v WASHINGTON*, 542 US___; 124 S Ct 2531;___L Ed 2d ____ (2004) INAPPLICABLE TO THE MICHIGAN STATUTORY SENTENCING GUIDELINES?

The People submit the answer is, "yes."

Defendant contends the answer should be, "no."

A majority of this Court stated the answer should be "yes". [in *People v Claypool,* ___Mich___;___NW2d___ (MSC #122696, 7/22/04)]

The Court of Appeals did not answer the question.

The trial court did not answer the question.

STATEMENT OF FACTS

The People adopt the statement of facts in Appellant's Brief on Appeal.

ARGUMENT

I. AS STATED BY A MAJORITY OF THIS COURT IN *PEOPLE v CLAYPOOL*, ___MICH___;___NW2d___ (MSC #122696, 7/22/04), THE UNITED STATES SUPREME COURT DECISION OF *BLAKELY v WASHINGTON*, 542 US___; 124 S Ct 2531;___L Ed 2d ____ (2004) IS INAPPLICABLE TO THE MICHIGAN STATUTORY SENTENCING GUIDELINES.

Standard of Review:

Issues of constitutional law are reviewed de novo. *People v Nutt,* 469 Mich 565; 677 NW2d 1, 5 (2004)

Issue Preservation:

Defendant did not object that the scoring of defendant's guidelines violated due process. Because *Blakely v Washington, supra* was an application of *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant would have to have objected to preserve this issue in the lower court.

Discussion:

As a majority of this Court has indicated, *Blakely v Washington*, *supra* is inapplicable to the Michigan statutory sentencing guidelines. *People v Claypool, supra* A jury verdict automatically entitles, and many times requires, the sentencing court to impose the statutory maximum without making any factual findings. MCL 769.8(1) Any factual findings made by the sentencing courts in scoring the sentencing guidelines solely affect a defendant's minimum sentence, and do not implicate *Apprendi v New Jersey*, *supra et al.*

A. Cases Preceding *Blakely v Washington, supra*

Blakely v Washington, supra was the culmination of a line of cases begun by *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970). *In re Winship, supra* had indicated that the due process of law includes protecting a defendant against conviction except by proof beyond a reasonable doubt of every element of the crime *i.e* every fact necessary to constitute a crime with which he is charged. 397 US at 364 *Apprendi v New Jersey, supra* clarified the definition of "element" as "any fact which increases the penalty beyond the prescribed statutory maximum." 530 US at 490

The United States Supreme Court reiterated this definition with its decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 5324 (2002). In *Harris*, the United States Supreme Court found that a court's decision to impose a mandatory minimum sentence based on a factual finding on a less than beyond-a-reasonable-doubt standard of proof did not implicate due process. The Court stated that facts affecting a minimum sentence did not constitute elements of the crime as defined in *Apprendi*. 536 US at 568 *Harris* also confirmed the validity of *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986) which had previously made this same finding.[1] *Id.*

[1]In *McMillan*, the court imposed a mandatory minimum sentence after finding by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the offense. In *Harris*, the Court confirmed the constitutionality of a statute that allowed imposition of a mandatory minimum sentence for brandishing *or discharging a weapon.* The factual findings in *McMillan* and *Harris* were very close to one of the contested findings made in this case, discharge of a weapon. The Supreme Court stated in *McMillan*, "The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one fact that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm."; See also: *Harris*, 536 US at 568

Harris reiterated that constitutional guarantees only attach to those factors which are defined as essential elements and that a court could legitimately impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. 536 US at 549 *Harris* specifically indicated that *statutes* could legitimately, without implicating due process, direct judges to give specific weight to certain facts when choosing the sentence as long as those factors did not increase the defendant's statutory maximum.[2] 536 US at 549-550

The Supreme Court in *McMillan* stated that "we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties." The Court also said that preventing and dealing with crime was much more the business of the states than it was the federal government and the Court should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. 477 US at 85, 86

B. *Blakely v Washington, supra*

Unlike in *Harris*, the Supreme Court's decision in *Blakely v Washington, supra* involved a sentencing scheme which impacted a defendant's maximum sentence. In *Blakely*, the United States Supreme Court invalidated the sentencing scheme of the State of Washington on the grounds that it violated the strictures of *Apprendi*. In *Blakely*, the defendant pled guilty to the crime of second degree kidnapping. In Washington, every defendant convicted of this offense was exposed to a determinate maximum sentence within the statutory guidelines of 49 to 53

[2]Whether chosen by the judge or legislature, the facts guiding judicial discretion below the sentencing maximum need not be submitted to a jury or proven beyond a reasonable doubt because the jury has already found all the facts necessary for the state to impose the sentence.

months. If the court found substantial and compelling reasons based on factual findings, the court could depart above the statutory maximum, but no higher than 120 months. WA ST 9.94A.535, 9.94A.505(5) In *Blakely*, the sentencing court had increased the defendant's maximum sentence to 90 months incarceration based on a factual finding that the defendant acted with deliberate cruelty. 124 S Ct at 2534

The United States Supreme Court found that, because the statutory scheme allowed the court to increase the maximum sentence above that allowed by a jury verdict/plea based on a factual finding by the court, the court's elevation violated *Apprendi*. The Court stated, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'"[3] (emphasis original) 124 S Ct at 2537 The *Blakely* Court wanted to prevent the jury from being reduced merely to a gate-keeping function in which a defendant convicted of a crime carrying a five-year maximum for example could face up to a life sentence based solely on a court's factual findings. 124 S Ct at 2542 The Court reiterated, however, that if the jury verdict alone authorized the sentence, it was permissible under *Apprendi et al.* 124 S Ct at 2537, 2538 Therefore if a crime allowed for a life

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The judge may impose the minimum, the maximum, or any sentence within the range without seeking further authorization from those juries.

[3] The facts in *Ring v Arizona,* 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), decided the same day as *Harris* were similar to *Blakely*. In *Ring*, the Supreme Court invalidated Arizona's death penalty scheme. In *Ring*, a judge could not sentence the defendant to death without finding certain enumerated aggravating factors and lack of any mitigating factors. The United States Supreme Court stated that the maximum sentence *Ring* could have received based on the jury verdict was life imprisonment because the judge, not a jury, elevated the defendant's maximum based on a factual finding. 536 US 589, 604 citing *Apprendi v New Jersey*, 530 US at 494

sentence [like this case] and the court gave a sentence under the maximum allowed by law, it would not violate procedural due process.

The Court then specifically distinguished *McMillan* and *Harris*, in which the Court imposed a statutory minimum sentence based on facts found by the court, not a jury, by a less than beyond-a-reasonable-doubt standard, and cited these cases with approval. 124 S Ct at 2538 In *McMillan*, the case involved a similar sentencing scheme as that in Michigan, where the court imposed both a minimum and maximum sentence. *McMillan v Pennsylvania*, 477 US at 82, n 2 *Blakely* noted that in *McMillan* and *Harris*, the statutes [which allowed imposition of a mandatory minimum sentence] did not authorize a sentence in excess of that otherwise allowed for the underlying offense. 124 S Ct at 2538

Justice Scalia, writing for the majority, also indicated that *indeterminate* sentencing schemes did not suffer from the same constitutional infirmities as *determinate* schemes. Washington had a sentencing scheme in which the court selected one [determinate] number for a defendant's sentence. Once the defendant started serving the sentence, he could not be paroled. Justice Scalia compared that scheme to an indeterminate scheme:

> [Indeterminate sentencing] increases judicial discretion, to be sure, *but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.* Of course, indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) *may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.* But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--*and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.* In a system that says a judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--any by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. (emphasis supplied)

124 S Ct at 2540 *Blakely,* then, applies to *determinate* sentencing schemes where the statutory guidelines *require* a fixed sentence be imposed within a range, with the statutory scheme permitting the judge to enhance the *maximum* sentence based on judicial factfinding.

C. The Application of *Blakely v Washington, supra* to the Michigan Sentencing Guidelines.

Blakely v Washington, supra does not impact the Michigan sentencing scheme. In Michigan, unlike Washington, the statutory guidelines pertain to a defendant's minimum sentence not the maximum. MCL 769.34(2) Because *Blakely* specifically cited *Harris v United States* and *McMillan v Pennsylvania, supra* with approval [124 S Ct at 2538] which held that a judge could make factual findings which determine a defendant's minimum sentence on a less than beyond-a-reasonable-doubt standard of proof, any findings concerning a defendant's minimum sentence do run afoul of *Blakely.*[4]

Furthermore, nowhere did *Blakely* state it was changing the definition of "element" as previously posed by *Apprendi*, but merely that it was applying its holding in *Apprendi* to the facts before it. 124 S Ct at 2536 *Apprendi* had specifically stated, "nothing in [our] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a sentence *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." (emphasis original) 530 US at 481-482, 497 n 21 The holding, then, of *Apprendi* that "[o]ther

[4] In no way can it be said that the sentencing judge in setting the minimum, even by departing from the guidelines, is setting the statutory maximum as in *Blakely* because it is quite possible that defendants will not be paroled and will serve above the minimum sentence. In Michigan, it is only the maximum that a defendant cannot serve above, the maximum the jury verdict allowed.

than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," [530 US at 490] by its own terms, has nothing to do with "imposing a judgment *within the range* prescribed by statute," where the trial judge is free to take "into consideration various factors relating *both to offense* and offender." Therefore, the state is free to create a statutory scheme including offense variables to establish that sentence within the range prescribed by statute as long as within the statutorily set maximum.

Also in Michigan, a jury verdict allows a judge to set the defendant's maximum at up to the statutory maximum of the particular crime defendant was convicted of. MCL 769.8(1) Defendants receive notice from the very inception of the case that the jury verdict would allow a maximum sentence of up to the statutory maximum. A judge does not have to make any factual findings at all to impose the statutory maximum. In like manner, a judge in Michigan is not permitted to sentence a defendant to a maximum sentence higher than the statutory maximum. It is only if a judge were able to impose a sentence higher than the statutory maximum, would the sentence violate *Blakely*.

Also in Michigan the sentence imposed, when a prison sentence, must be indeterminate [other than for a few specified crimes such as felony firearm where the statute requires imposition of a determinate sentence]. The parole board determines defendant's eventual eligibility for parole. MCL 791.234 Indeterminate sentencing is defined as the following:

> The practice of not imposing a definite term of confinement, but instead prescribing a range for the minimum and maximum term, leaving the precise term to be fixed in some other way, usu. based on the prisoner's conduct and apparent rehabilitation while incarcerated.

* * *

1. A sentence of an unspecified duration, such as one for a term of 10 to 20 years.
2. A maximum prison term that the parole board can reduce through statutory authorization, after the inmate has served the minimum time required by law.

Black's Law Dictionary, (7th ed. 1999); See also: MCL 769.8, MCL 791.234(indicating that Michigan has an indeterminate sentencing scheme)[5] The majority in *Blakely* indicated that indeterminate sentencing schemes did not offend procedural due process.[6]

D. *People v Claypool*___Mich___;___NW2___ (MSC #122696)

A majority of this Court in *People v Claypool, supra* indicated that *Blakely v Washington, supra*, did not impact the Michigan legislative sentencing guidelines. Justices Taylor and Markman indicated that Michigan has an indeterminate sentencing system in which the maximum is not set by the judge but instead set by law and noted that a court's sentence could never increase the maximum [except for habitual offender sentences which were excluded from *Blakely's* holding]. Justices Taylor and Markman noted that the majority in *Blakely* specifically approved the constitutionality of indeterminate sentencing schemes. *Claypool, supra* Slip. Op. at 17 n 14, Taylor, J. *writing for the majority* The Chief Justice agreed with the majority that

[5] The maximum sentence for armed robbery in particular is indeterminate. If the court did not impose life, it could select any term of years it wished as long as the sentence was at least one-third or greater than the minimum term. MCL 769.34(2)(b)

[6] Defendant claims that only if the legislature provided no guidance to a court in arriving at an appropriate sentence would the sentencing scheme be truly indeterminate and pass the strictures of *Apprendi* and *Blakely*. However, if the facts judges consider when exercising their discretion *within the statutory range* are not elements, they do not become as much merely because the legislatures require the judge to impose a minimum sentence when those facts are found. *McMillan* 477 US at 92

Blakely did not invalidate Michigan's indeterminate sentencing scheme.[7] *Id.*, Slip. Op. at 1, 10, Corrigan, C.J., *concurring in part, dissenting in part* Justice Cavanagh agreed with the majority's conclusion that *Blakely v Washington, supra*, did not appear to affect "scoring decisions that establish *minimum* sentences" (emphasis original) such as in Michigan. *Id.* Slip. Op. at 1, Cavanagh, J., *concurring in part, dissenting in part* Justice Weaver concurred with the majority's conclusion that *Blakely* did not affect Michigan's scoring system which establishes the recommended *minimum* sentence, but only those facts which increase the penalty for the crime beyond the prescribed maximum. *Id.* Slip. Op. at 2, Weaver, J., *dissenting in part, concurring in part* Justice Young concurred that Michigan's sentencing scheme is unaffected by *Blakely. Id.* Slip. Op. at 2, n 1, Young, J., *concurring in part, dissenting in part* Justice Kelly did not render an opinion but solely indicated that the issue needed full briefing. *Id.* Slip. Op. at 1, Kelly, J., *concurring in part, dissenting in part*

E. *People v Eason*, 435 Mich 228; 458 NW2d 17 (1990)

A court can, without violating *Apprendi v New Jersey, supra* and *Blakely v Washington*, establish a defendant's minimum sentence based on factual findings on a less than beyond-a-reasonable-doubt standard. Therefore procedural due process is not violated by findings on the offense variables on a less than beyond-a-reasonable-doubt standard regardless of whether the offense variables involve conduct by the co-defendant. "There is, after all, only one Due Process Clause in the Fourteenth Amendment." *McMillan v Pennsylvania*, 477 US at 91 The United

[7] The Chief Justice noted, however, "the majority's sweeping language regarding judicial powers to effect departures (not limited to downward departures) will invite challenges to Michigan's scheme." The Chief Justice also believed that mandatory minimum sentences could be vulnerable under *Blakely*. *Id.*, Slip. Op. at 1, 10, However, in the case at bar, the sentencing court departed downward from the sentencing guidelines and a mandatory minimum sentence was not imposed.

States Supreme Court in *McMillan* indicated that "sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" [citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 2d (1949)] and noted that the Court had consistently approved of sentencing schemes which mandated consideration of facts related to the crime. 477 US at 91-92 *McMillan* also noted that there was no Sixth Amendment right to a jury sentencing, even when the sentence turned on specific findings of fact.[8] 477 US at 93

It is within the power of the state to regulate procedures under which its laws are carried out, and its decision is not subject to proscription under the due process clause unless "it offends

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[8]In *Blakely* itself, the Supreme Court cited *Williams v New York, supra* with approval. *Blakely* stated:

> *Williams* involved an indeterminate sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 US., at 242-243, and n. 2. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.* at 252. Thus, neither case [*McMillan* nor *Williams*] involved a sentence greater than what state law authorized on the basis of the verdict alone.

124 S Ct at 2538 In *Williams v New York, supra* the United States Supreme Court found that it did not violate the due process clause of the Fourteenth amendment for the Court to rely on out-of-court sources [*i.e.* not facts found by the jury or admitted by the defendant] for imposition of the death penalty. The Court stated:

> But both before and since the American colonies became a nation, courts in this county and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> * * *
>
> The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.

337 US at 246, 250-251 In accord: *Payne v Tennessee*, 501 US 808, 820; 112 S Ct 28; 115 L Ed 2d 720 (1991) *reh den* 501 US 1277; 112 S Ct 28; 115 L Ed 2d 1110 (1991)

some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McMillan v Pennsylvania*, 477 US at 85 This Court has stated that as long as a factor does not constitute an element of the crime as defined by *In re Winship, supra*, fundamental due process at sentencing merely requires that the sentence be based on accurate information which the defendant had a reasonable opportunity to challenge. *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990)(indicating that due process does not require trial-type evidentiary burdens on the sentencing process); *People v Miles*, 454 Mich 145, 173-174; 560 NW2d 600 (1997) This Court in *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987) established the preponderance-of-the-evidence standard to determine contested factual matters at sentencing proceedings.

It is clear that defendants have the ability to challenge a sentencing court's scoring of the sentencing guidelines and the prosecution must prove the facts underlying the offense variable scoring by a preponderance of the evidence if effectively challenged by defendant. Due process requires nothing more. Procedural due process does not constrain the Legislature's selection of certain factors it believes are important for sentencing of defendants even if these factors relate to conduct of a defendant's co-defendant.[9] The defendant was provided with procedural due process at sentencing in this case.

[9] "The fact that the states have formulated different sentencing schemes to punish armed felons is merely a reflection of our federal system which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan v Pennsylvania*, 477 US at 90 citing *Spencer v Texas*, 385 US 554, 566; 87 S Ct 648; 17 L Ed 2d 606 (1967)

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the Court of Appeals' opinion remanding the defendant for resentencing for reasons stated *supra* and in Plaintiff-Appellant's brief on appeal.

Respectfully Submitted,

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PROSECUTING ATTORNEY
OAKLAND COUNTY

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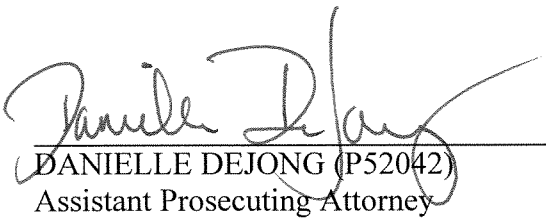
By: 
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